

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 1, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2631

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOHN E. ZENNER,

PLAINTIFF-APPELLANT,

V.

WISCONSIN OVEN CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. John E. Zenner has appealed from a judgment dismissing his complaint against Wisconsin Oven Corporation. In his complaint, Zenner alleged that Wisconsin Oven breached a contract entered into with him when he commenced employment with Wisconsin Oven in September 1992. The trial court dismissed Zenner's claim at the close of his presentation of his case to

the jury, determining that any agreement entered into between the parties was unenforceable under the statute of frauds as set forth in § 241.02, STATS. We affirm the trial court's judgment.

A motion challenging the sufficiency of the evidence to support a verdict in favor of the plaintiff may not be granted unless the court is satisfied that, considering all credible evidence in the light most favorable to the plaintiff, there is no credible evidence to sustain a finding in his or her favor. *See Weiss v. United Fire & Cas. Co.*, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). This standard applies to the trial court when a defendant moves to dismiss at the close of the plaintiff's case and to this court on review of the trial court's decision on that motion. *See id.* An appellate court may not overturn a trial court's decision to dismiss for insufficient evidence unless the record reveals that the trial court was clearly wrong. *See id.* at 389, 541 N.W.2d at 761.

Because no credible evidence supported a finding that Zenner and Wisconsin Oven entered into an enforceable agreement, the trial court properly dismissed Zenner's complaint. In dismissing the breach of contract claim, the trial court relied on § 241.02, STATS., which provides:

(1) In the following case every agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:

(a) Every agreement that by its terms is not to be performed within one year from the making thereof.

Zenner's first argument is that the evidence establishes that he and Wisconsin Oven had a meeting of minds as to the terms of a contract and that equitable considerations therefore compel that their agreement be enforced, even if it did not technically meet all requirements of the statute of frauds. He relies on

U.S. Oil Co. v. Midwest Auto Care Servs., 150 Wis.2d 80, 90, 440 N.W.2d 825, 828 (Ct. App. 1989), for the proposition that the statute of frauds was intended to prevent fraud and perjury, not to give one party or another a technical escape from a fair and definite agreement.

The burden is on a party seeking to enforce a contract to show facts which take the case outside of the statute of frauds. *See Spensley Feeds v. Livingston Feed & Lumber, Inc.*, 128 Wis.2d 279, 286, 381 N.W.2d 601, 604 (Ct. App. 1985). Zenner failed to meet his burden here.

In support of his claim that a definite and enforceable agreement was reached by the parties, Zenner relies primarily on trial exhibits 15 and 28. Trial exhibit 15 constituted a handwritten document prepared by Zenner and captioned "Agreement-Product Rights and Patents Assignment-Zenner/WOC." Zenner testified that exhibit 15 was produced by him in response to his negotiations with Henry Kubicki, the president of Wisconsin Oven. Zenner testified that he prepared exhibit 15 from another handwritten document prepared by him, which was captioned "Addendum A-Zenner & Interests," and constituted trial exhibit 28. Trial exhibit 28 also included a document captioned "Inter Office Memo" imprinted with the Wisconsin Oven name, address, telephone and fax numbers, which was dated September 18, 1992, and contained terms regarding Zenner's compensation which were like those contained in exhibit 15. The September 18, 1992 memo also stated: "By Zenner-Assignment of product and patent rights now and in the future to Wisconsin Oven Corporation." Zenner argues that, taken together, these exhibits made up the agreement reached by him and Wisconsin Oven.

To be enforceable a contract must be definite and certain as to its basic requirements and terms. *See Witt v. Realist, Inc.*, 18 Wis.2d 282, 297, 118 N.W.2d 85, 93 (1962). Contrary to Zenner's contentions, exhibits 15 and 28 and the testimony concerning them provide no basis for concluding that a complete and definite agreement was reached between the parties. The exhibits primarily set forth terms for the benefit of Zenner, including terms regarding salary, royalties, bonuses and benefits. While they indicated that he was to receive a salary from Wisconsin Oven, they contained no provision concerning the nature and scope of his employment. Similarly, while they referred to royalty payments and product designs, they were silent as to what specific products, patents and patent rights were being conveyed and what products or patents even existed or were intended to be developed in the future.

Zenner testified that he originally expected that Addendum B would be prepared to set forth his obligations in the relationship but that Kubicki told him it was unnecessary and it therefore was never prepared. On appeal, he contends that the failure to include more specific language regarding his obligations was unimportant because the parties' conduct after September 1992, including his commencement of employment with Wisconsin Oven, established that they understood the terms of their agreement and operated pursuant to it.

We disagree. While the parties entered into an employment relationship in September 1992, nothing in the record clearly establishes what the governing terms and conditions of that relationship were. At best, the record establishes that they had an "agreement to agree" which was never completed and is thus unenforceable. *See id.* at 298, 118 N.W.2d at 94; *Dunlop v. Laitsch*, 16 Wis.2d 36, 42, 113 N.W.2d 551, 554 (1962). Because a definite agreement was never entered into by the parties, the record provides no basis for Zenner's claim

that regardless of whether the statute of frauds is satisfied, enforcement of his alleged contract is necessary to prevent fraud and to avoid giving Wisconsin Oven a technical escape from a fair and definite agreement.

Zenner's remaining arguments also provide no basis for disturbing the trial court's judgment. He argues that he is entitled to relief based on the doctrine of partial performance because it was possible for him to completely perform his obligations under the parties' agreement within one year. We disagree. The contract terms drafted by Zenner required Wisconsin Oven to employ him and pay him a salary for a minimum of seven years, thus indicating that his performance of employment duties for seven years was also required.

Zenner also argues that he might have died in the first year of the employment, thus terminating his obligations to Wisconsin Oven. Based on this possibility, he contends that it must be deemed possible for him to have fully performed his obligations within one year.

The "death exception" referred to by Zenner has been applied to a contract which was to last a lifetime. See *Heath v. Heath*, 31 Wis. 223, 228-29 (1872). However, when a contract is not for a lifetime term, the mere possibility that a party will die within one year of entering it does not, standing alone, remove it from the statute of frauds. See *Chase v. Hinkley*, 126 Wis. 75, 78-79, 105 N.W. 230, 231 (1905). To hold otherwise would render § 241.02(1), STATS., almost completely meaningless to contracts involving individuals.

Zenner's final argument is that the statute of frauds was satisfied because terms of the parties' agreement were set forth on a letterhead memorandum by Wisconsin Oven. He contends that its use of letterhead paper indicates that Wisconsin Oven subscribed to the agreement.

This argument is clearly specious. While the memo and the testimony concerning it may have been sufficient to establish that Wisconsin Oven agreed that any contract it entered into with Zenner would include the terms set forth in the memo, since the complete terms of a contract were never agreed upon, the memo cannot be construed as a subscription by Wisconsin Oven to a contract. We therefore need not address the parties' arguments concerning the sufficiency of the subscription any further.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

